Supreme Court, U.S.
FILED
OCT 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

Number 86-195

In The
Supreme Court of the United States

OCTOBER TERM, 1986

ARKON SHIPPING AGENCY, INC., KONKAR SHIPPING AGENCIES, S.A., AND KONKAR RESOLUTE CORPORATION,
Petitioners,

VERSUS

AMELIA KASSAPAS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGIOS KASSAPAS, AND AS TUTRIX OF THE ESTATES OF THE MINOR CHILDREN, NIKOLAS KASSAPAS AND CONSTANTINOS KASSAPAS; DESPINA KASSAPAS; CONSTANTINOS KASSAPAS; GEORGIOUS LAMBOU, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ANDREAS LAMBOU; VASILIKI LAMBOU; SOFIA LAMBOU; AND VASILIKI LAMBOU,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana

PAUL H. DUÉ
Counsel of Record
5555 Hilton Avenue, 5th Floor
Baton Rouge, LA 70808
Telephone: 504 927-1064
Attorney for Respondents

QUESTION PRESENTED

Is a state court, hearing a Jones Act and general maritime claim pursuant to the "savings to suitors" clause contained in 28 U.S.C. sec. 1333, able to apply its own rule with respect to *forum non conveniens* as it could if it were hearing a claim under the Federal Employers' Liability Act?

TABLE OF CONTENTS

Page

Corrections to Statement of the Case 1
Summary of Argument 3
Argument 4
Conclusion 9
Certificate 10

TABLE OF AUTHORITIES

Cases: *Page*

Fisher v. AGIOS NICOLAOS V, 628 F.2d 308 (5th Cir. 1980), *cert. denied, sub nom Valmas Brothers Shipping, S.A. v. Fisher*, 454 U.S. 816, 102 S.Ct. 92, 70 L.Ed.2d 84 (1981) 7
Flores v. Central American Steamship Agency, Inc., 594 F. Supp. 735 (S.D.N.Y. 1984) 2
Garrett v. Moore-McCormack Company, 317 U.S. 239, 244, 63 S.Ct. 246, 250, 87 L.Ed. 239, 243 (1942) 3, 4, 5
Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 67 S.Ct. 838, 91 L.Ed. 1055 (1947) 5
Just v. Chambers, 312 U.S. 383, 392, 61 S.Ct. 687, 693, 85 L.Ed. 903, 909 (1941) 8
Karros v. S/D LIRYC, 247 F. Supp. 554 (E.D. Va. 1965) 2
Koupetoris v. Konkar Intrepid Corp., 402 F.Supp. 951, 953 (S.D.N.Y. 1975), aff'd. 535 F.2d 1392 (2d Cir. 1976) 7
Missouri ex rel. Southern Railway Company v. Mayfield, 340 U.S. 1, 4, 5, 71 S.Ct. 1, 3, 95 L.Ed. 3, 8 (1950) 4, 5, 9
Norfolk and Western Railway Company v. Beatty, 400 F. Supp. 234 (S.D.Ill. 1975), aff'd, 423 U.S. 1009, 96 S.Ct. 439, 46 L.Ed. 2d 381 (1975) 5
Perez v. OMNIUM TRADER, 174 F. Supp. 876 (E.D. La. 1959) 2
Red Cross Line v. Atlantic Fruit Company, 264 U.S. 109, 44 S.Ct. 274, 68 L.Ed. 582 (1924) 7
Sibaja v. Dow Chemical Company, 757 F.2d 1215 (11th Cir. 1985), cert. denied, _____ U.S. _____ , 106 S.Ct. 347, 88 L.Ed.2d 294 (1985) 6, 7

Cases: *Page*

San Pedro Compania Armadoras v. Yannacopoulos, 357 F.2d 737, 740 n.2 (5th Cir. 1966) 2

Articles:

Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L.Q. 12 (1949) 6

Currie, *Change of Venue and the Conflict of Laws*, 22 U. Chicago L. Rev. 405, 416 (1955) 6, 7

Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. Pa. L. Rev. 781, 831-40 (1985) 6

Number 86-195

In The
Supreme Court of the United States

OCTOBER TERM, 1986

ARKON SHIPPING AGENCY, INC., KONKAR SHIPPING AGENCIES, S.A., AND KONKAR RESOLUTE CORPORATION,
Petitioners,

VERSUS

AMELIA KASSAPAS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGIOS KASSAPAS, AND AS TUTRIX OF THE ESTATES OF THE MINOR CHILDREN, NIKOLAS KASSAPAS AND CONSTANTINOS KASSAPAS; DESPINA KASSAPAS; CONSTANTINOS KASSAPAS; GEORGIOUS LAMBOU, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ANDREAS LAMBOU; VASILIKI LAMBOU; SOFIA LAMBOU; AND VASILIKI LAMBOU,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana

May It Please The Court:

CORRECTIONS TO STATEMENT OF THE CASE

Undersigned counsel respectfully disagrees with the statement made by counsel for petitioners that "it was determined that the laws of the United States were not applicable to plaintiffs' claims" (Petition for Certiorari, p.

5) by the federal district court in New York. On the contrary, the memorandum opinion (Appendix, pp. 16a et seq.) contains only traditional *forum non conveniens* analysis and no definitive choice of law analysis or holding demonstrating inapplicability of United States law. Similarly, the unreported opinion of the United States Court of Appeals for the Second Circuit (Appendix, pp. 19a, 20a) only states that defendants' contacts with the United States were too insubstantial to make one of them an employer subject to the provisions of the Jones Act. No consideration was given to applicability of American general maritime law, particularly with respect to the unseaworthiness wrongful death action, including consideration of the fact that Liberian law makes the non-statutory law (and thus general maritime law of unseaworthiness) of the United States of America the law of Liberia,* and the concomitant fact that the ship owner, which would be legally responsible for unseaworthiness, was at all pertinent times a Liberian Corporation. Undersigned counsel also respectfully disagrees with the statement made by counsel for petitioners that Konkar Resolute Corporation "maintains its principal place of business in Greece." (Petition for Certiorari, p. 4) The Louisiana trial judge in the instant case, on the contrary, stated that the ship owner's "office and principal place of business is in Monrovia, Liberia." (Appendix, p. 11a)

**See San Pedro Compania Armadoras v. Yannacopoulos*, 357 F.2d 737, 740 n. 2 (5th Cir. 1966). See also *Perez v. OMNIUM TRADER*, 174 F. Supp. 876 (E.D.La. 1959); *Karros v. S/S LIRYC*, 247 F. Supp. 554 (E.D.Va. 1965) and *Flores v. Central American Steamship Agency, Inc.*, 594 F. Supp. 735 (S.D.N.Y. 1984).

SUMMARY OF ARGUMENT

The principle of uniformity is no different in general maritime or Jones Act litigation than it is in FELA litigation. In both situations the general rule is that the substantive federal law must be followed by the state court hearing either type case under the saving to suitors clause, but as to matters of procedure, the state court is able to follow its own procedural statutes and requirements. While this Court has previously recognized the difficulty of classifying a particular issue as one of substance versus procedure, with respect to the specific issue herein, namely, the question of applicability of the doctrine of *forum non conveniens*, this Court has previously definitively ruled that *forum non conveniens* is not part of the federal substantive FELA remedy, with the result that a state court is free to apply its own rule with respect to *forum non conveniens*. The same rationale ought to be applied to the instant Jones Act and unseaworthiness cause of action and the petition for certiorari accordingly ought to be denied.

ARGUMENT

The principle of uniformity, so heavily espoused by proponents for certiorari herein, is no different in Jones Act or admiralty claims than it is in FELA claims. Such was made perfectly clear by this Court in *Garrett v. Moore-McCormack Company*, 317 U.S. 239, 244, 63 S.Ct. 246, 250, 87 L.Ed. 239, 243 (1942), one of the cases on which defense counsel so heavily relies concerning uniformity:

"This Court has specifically held that the Jones Act

> is to have a uniform application throughout the country unaffected by 'local view of common law rules.' Panama R. Co. v. Johnson, 264 U.S. 375, 392, 44 S.Ct. 391, 396, 68 L.Ed. 748. The Act is based upon and incorporates by reference the Federal Employers' Liability Act, 45 U.S.C.A. sec. 51 et seq., which also requires uniform interpretation. Second Employers Liability Cases (Mondou v. New York, New Haven & Hartford Railroad Co.), 223 U.S. U.S. 1, 55 et seq., 32 S.Ct. 169, 177, 56 L.Ed. 327, 38, 38 L.R.A., N.S., 44."

While counsel for proponents for certiorari argue that the federal doctrine of *forum non conveniens* is substantive rather than procedural, said counsel have not attempted to distinguish or explain away this Court's decision in *Missouri ex rel. Southern Railway Company v. Mayfield*, 340 U.S. 1, 4, 5, 71 S.Ct. 1, 3, 95 L.Ed. 3, 8 (1950), specifically relied upon by the Louisiana Court of Appeal for the Fifth Circuit in the instant case, which expressly held that the doctrine of *forum non conveniens* is not part of the substantive FELA remedy, and, instead, any state court hearing a FELA case under the saving to suitors clause is free to apply its own *forum non conveniens* rule or lack thereof:

> ". . . Whether a State makes such a choice is, like its acceptance or rejection of the doctrine of *forum non conveniens*, a question of State law not open to review here."

***

> "Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be

> freed to decide the availability of the principle of *forum non conveniens* in these suits according to its own local law."

Mayfield, of course, came just three years after *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 67 S. Ct. 838, 91 L.Ed. 1055 (1947), the seminal case recognizing a federal common law *forum non conveniens* doctrine. Thus, after having recognized the doctrine, this Court characterized it as procedural in nature, not substantive, and hence not binding upon state courts, which are instead free to apply their own doctrine of *forum non conveniens* or lack thereof.

The federal court in *Norfolk and Western Railway Company v. Beatty*, 400 F. Supp. 234 (S.D. Ill. 1975), aff'd, 423 U.S. 1009, 96 S.Ct. 439, 46 L.Ed.2d 381 (1975), held that the aforementioned pronouncement by this Court is equally applicable to Jones Act cases tried in state court as it is to FELA cases tried in state court:

> "Since state rules on *forum non conveniens* govern in F.E.L.A. and Jones Act matters, by analogy state procedure should control here. *Missouri ex rel. Southern Railway v. Mayfield*, 340 U.S. 1, 71 S.Ct. 1 (1950)," (*Id.* at 237.)

Since there is no difference in the principle of uniformity between FELA cases tried in state court on the one hand and Jones Act and general maritime law cases tried in state court on the other hand, *Garrett, supra*, the holding by this Court in *Mayfield, supra*, concerning *forum non conveniens* should be equally applicable and dispositive in the instant case.

Any remaining doubt concerning the procedural ver-

sus substantive nature of *forum non conveniens* should have been put to rest by the recent decision of the United States Court of Appeals for the Eleventh Circuit in *Sibaja v. Dow Chemical Company*, 757 F.2d 1215 (11th Cir. 1985). Holding that a federal court in a diversity case is not obligated by the *Erie* doctrine to apply *forum non conveniens* law, the *Sibaja* court linked *forum non conveniens* to a court's "inherent power" to control its own docket (*Id.* at 1218); the Court stated that *forum non conveniens* is "a rule of venue, not a rule of decision," that it is a matter "completely apart from any application of . . . substantive law." (*Id.* at 1219.) This Court unanimously denied certiorari, _____ U.S. _____, 106 S.Ct. 347, 88 L.Ed.2d 294 (1985).

Confronted with the jurisprudence clearly demonstrating that *forum non conveniens* is obviously procedural only and not substantive, counsel for proponents for certiorari argue from broad assertions of policy, asserting a need for uniformity in the American maritime law. This argument is almost completely beside the point, inasmuch as it is widely conceded that there is absolutely no uniformity in the federal court's reactions to *forum non conveniens* pleas in maritime and other cases. See Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U.Pa.L.Rev. 781, 831-40 (1985); Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L. Q. 12 (1949). The federal *forum non conveniens* jurisprudence has been aptly described as "notoriously complex and uncertain," with no predictability or uniformity at all. Currie, *Change of Venue and the Con-*

flict of Laws, 22 U. Chicago L. Rev. 405, 416 (1955). Thus, it is inconceivable that *following the law*—which plainly characterizes *forum non conveniens* as a procedural rule of venue and therefore governed by the law of the forum (*see, e.g., Sibaja, supra*)—could offend any meaningful uniformity goal.

Had *Fisher v. AGIOS NICOLAOS V*, 628 F.2d 308 (5th Cir. 1980), *cert. denied, sub nom Valmas Brothers Shipping, S.A. v. Fisher*, 454 U.S. 816, 102 S.Ct. 92, 70 L.Ed.2d 84 (1981), arisen in New York rather than in Beaumont, for example, one can candidly state that in all likelihood it would have suffered *forum non conveniens* dismissal in the federal trial court and that decision would again likely have been affirmed as not constituting an abuse of discretion, *cf. Koupetoris v. Konkar Intrepid Corp.*, 402 F.Supp. 951, 953 (S.D.N.Y. 1975), aff'd, 535 F.2d 1392 (2d Cir. 1976)—thus illustrating the disparity of result even in the federal judicial system depending upon the vagaries of geography.

This Court has previously recognized that a state is free to adopt remedies and procedures to apply to admiralty matters, in supplementation of the federal admiralty law, even where the admiralty court would not be able to accord a similar remedy. In *Red Cross Line v. Atlantic Fruit Company*, 264 U.S. 109, 44 S.Ct. 274, 68 L.Ed.582 (1924), for example, this Court, in holding the New York arbitration law specific performance requirements available and enforceable with respect to maritime contracts, even though a federal court in admiralty could not then have granted specific performance, stated that the right of a common law remedy, saved to suitors, does

include all means which may be employed to enforce the right or to redress the injury involved and that a state, having concurrent jurisdiction, is free to adopt such remedies and to attach to them such incidents, as it sees fit.

That is all that has happened in the instant case. Louisiana has seen fit to open its courts to litigants over whom it has requisite jurisdiction and has not seen fit to empower its courts to decline such jurisdiction under the doctrine of *forum non conveniens*.

Even when the matter at issue was properly characterized as substantive rather than procedural, this Court has still permitted applicability of the state remedy in supplementation of the existing admiralty remedy. In *Just v. Chambers*, 312 U.S. 383, 392, 61 S.Ct. 687, 693, 85 L.Ed. 903, 909 (1941), for example, this Court, in recognizing the Florida state survival rule, enunciated the following in response to the ship owner's plea of violation of admiralty uniformity:

> "Our decisions in the wrongful death cases also meet the further argument which is addressed to lack of uniformity. For whatever lack of uniformity there may be in giving effect to the state rule as to survival is equally present when the state rule is applied to wrongful death, or, for that matter, in any case when state legislation is upheld in its dealing with local concerns in the absence of federal legislation. Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved. But as admiralty takes cognizance of maritime torts, there is no repugnancy to its characteristic features either in permitting recovery for wrongful death or in allowing compensation for a wrong to the living to be obtained from the tort-feasor's estate."

CONCLUSION

Since a state's "acceptance or rejection of the doctrine of *forum non conveniens* [is] a question of State law not open to review here," *Mayfield, supra*, certiorari should be denied.

Respectfully submitted:

PAUL H. DUÉ
5555 Hilton Avenue, 5th Floor
Baton Rouge, LA 70808
Telephone: 504 927-1064

Attorney for Respondents

CERTIFICATE

I CERTIFY that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana, have been mailed, postage prepaid, properly addressed, to:

Gerard T. Gelpi
Gelpi, Sullivan, Carroll & Laborde
430 Notre Dame Street
New Orleans, LA 70130

John C. McHose
Lillick, McHose & Charles
725 South Figueroa Street
Los Angeles, CA 90017

J. Dwight LeBlanc, Jr.
Chaffe, McCall, Phillips, Toler & Sarpy
1500 First NBC Building
New Orleans, LA 70112

Baton Rouge, Louisiana, this 7th day of October, 1986.

Paul H. Dué

PAUL H. DUÉ